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No. 94-0260

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

LYNN A. SCHEIB, BENJAMIN GROSSE, a minor, by LYNN A. SCHEIB, his next friend, and CARL SCHEIB,

Petitioners,

v.

JOAN C. GRANT, BURTON F. GRANT, and DOROTHY B. JOHNSON,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENTS JOAN C. GRANT AND BURTON F. GRANT IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Wi her the decision of the Seventh Circuit Court of Appeals, based upon decisions of the Second and Tenth Circuits, properly held that a father, who monitors the telephone conversations of his eleven year old son out of concern that the boy is being abused, did not violate the Omnibus Crime Control and Safe Streets Act of 1968.

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STATEMENT OF THE CASE

A father[1] observed his eleven year old son, Petitioner Benjamin Grosse, become visibly upset immediately after the boy talked on the phone with his mother, Petitioner Lynn Ann Scheib, and his step-father, Petitioner Carl Scheib. When this sequence of events occurred several times, the father attempted to talk with the child about what was disturbing him. However, the boy shunned his father's, and a sibling's, attempts to speak with him.

Because the boy refused to discuss anything, and because the episodes occurred only after conversations with Ms. Scheib, the father used the recording feature on a common, store bought answering machine attached to an extension phone in his home to record two conversations between the boy and Ms. Scheib. The father then listened to the recordings and, due to their content, brought them to his attorneys, Respondents Joan C. Grant and Burton F. Grant.

Joan Grant was the primary attorney representing the father in a custody and removal proceeding (the "Removal Proceeding") prompted by Ms. Scheib's decision to remarry and leave the jurisdiction of Illinois.[2] At the time the father brought the tapes to her, the dispute had been resolved between the parties. The father and Ms. Scheib had executed an agreement which allowed Ms. Scheib to remove the boy to Pennsylvania; the father retained extended visitation rights; and the agreement included "joint parenting" pro-

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[1] The father, James Grosse, is not a party to this suit. Pursuant to a settlement agreement between him and Petitioner Lynn Ann Scheib, Ms. Scheib agreed not to sue her ex-husband for any of the acts which have given rise to this suit. Instead, Ms. Scheib has sued Mr. Grosses' attorneys. See Memorandum Opinion and Order of the District Court, App. pp. 25-26.

[2] Ms. Scheib and James Grosse were divorced in 1982.

visions calling for each parent to participate in the major decisions affecting the boy.

The agreement, although signed by the parties, required approval by the judge presiding over the Removal Proceeding. The observed change in the boy's behavior and the subsequent taping occurred *after* the agreement was signed but prior to the scheduled hearing in the Removal Proceeding. The boy was lawfully with his father during this interim pursuant to the summer visitation provisions of the agreement.

When the parties appeared again in the Removal Proceeding, Ms. Scheib's attorneys informed the court of the taping. The following day the parties again appeared in court and again the issue of the tapes was raised. The judge then asked Joan Grant: "What about the tapes, Mrs. Grant?" Joan Grant then related what she heard when the father played the tapes for her, stating to the court:

> Your Honor, the child is being terrorized. The mother has embarked upon a course of conduct calculated to destroy any possible relationship between the child and the father. And the mother has gotten on the telephone and used profanities, threats to the child, violent statements. Your Honor, he wants to testify. He wants to tell you about these tapes, and I want the tapes to be put in the record. And I want the Court to know what the mother tells this little boy. I can't even lower myself, your Honor, to say the words that this mother is telling this little boy, that Mrs.—the stepmother, she is a fucking asshole, and that "I won't talk to you, you little shit, if you don't do what I say." And, "You keep a diary every day." And "You are having a shitty time there, aren't you?" And "It's too bad you have to stay," and she is—she—"just piss off on her. You just tell the women to piss off of you. You will come back. You will never have to come back. You will

> come back. I will get you back here. You won't stay there. We will see to it that you will never go back and see your dad again."[3]

Joan Grant had also related the substance of the conversation to the boys guardian *ad litem* and one of Ms. Scheib's attorneys.

Ms. Scheib then retained a major Chicago law firm to file a motion *in limine* to prevent the court from hearing the recording of her conversation with the boy. The evidentiary issue was fully briefed and the judge orally granted Ms. Scheib's motion.[4] Ms. Scheib's attorneys, however, never prepared an order reflecting the judge's oral ruling. As a result, under Illinois law, the judge's statements had no effect. Subsequently, the parties resumed negotiations and settled the matter.[5]

Less than six months later, the Petitioners filed their suit against Respondents.

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[3] The Petitioners never filed any responsive pleading or affidavit in the District Court proceeding, including their pleadings in opposition to Respondents' motion for summary judgement, challenging the accuracy of Joan Grant's recitation of the conversation. The Petitioners also opposed the Respondents efforts to have the tapes unsealed.

[4] Contrary to Petitioners' Statement of the Case, the court in the Removal Proceeding made no decisions on a minor's right to privacy. The only issue before the court was an evidentiary question.

[5] Contrary to the Petitioners' Statement of the Case, the court in the Removal Proceeding never refused to include a release which would have covered the Respondents. No such release was ever presented to the judge; rather, Ms. Scheib refused to agree to it in negotiations and the final draft of the agreement, and the only one presented for review by the court, did not include a general release. In the agreement, Ms. Scheib only promised not to sue the boy's father.

SUMMARY OF THE ARGUMENT

The Seventh Circuit, in accord with two other Circuits addressing similar situations, properly held that an explicit exemption in the Federal wiretapping act applied to the facts presented in the case. The Circuit Court did not create any new exceptions; rather, the court correctly concluded that the plain language of the exemption, which removes from the prohibitions of the act the use of an extension phone by the subscriber of the phone service in the ordinary course of that subscriber's business, applied in the case.

The court, like the majority of other circuits, rejected the notion that the wiretapping statute contains any "domestic relations" exception and held that the exemption did apply to a father who used an ordinary answering machine, attached to an extension phone in his home, to record conversations of his eleven year old son after previous conversations made the boy visibly upset. The court reasoned that the father was a subscriber and that investigating a perceived harm to his child was within the ordinary course of a parent's business.

ARGUMENT

I.

ALL UNITED STATES CIRCUIT COURTS OF APPEAL THAT HAVE ADDRESSED THE EXTENSION TELEPHONE EXEMPTION ARE IN ACCORD THAT A PARENT MAY USE AN EXTENSION TELEPHONE IN THE HOME TO MONITOR THE CONVERSATIONS OF A MINOR CHILD.

There is no conflict among the Circuit Courts of Appeal. All Circuits presented with factual situations analogous to those presented here have held that the Federal wiretapping statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510 et seq. (the "Act"), does not prohibit a parent from using an extension telephone located in the parent's home from listening to or tape recording a minor child's telephone conversation. *Anonymous v. Anonymous*, 558 F.2d 677 (2d Cir. 1977); *Newcomb v. Ingle*, 944 F.2d 1534 (10th Cir. 1991); *Janeka v. Franklin*, 843 F.2d 110 (2d Cir. 1988); *Scheib v. Grant*, 22 F.3d 149 (7th Cir. 1994).

None of the cases cited by the Petitioners, with the exception of another Tenth Circuit case, *Thompson v. Dulaney*, 970 F.2d 744 (10th Cir. 1992), involve a parent/subscriber of telephone service using an extension phone in the home to monitor his or her child's telephone calls. *United States v. Jones*, 542 F.2d 661 (6th Cir. 1976) (husband placed recording device on marital phone to catch wife in affair); *Fultz v. Gilliam*, 942 F.2d 396 (6th Cir. 1991) (interception to confirm spouses affair); *Bess v. Bess*, 929 F.2d 1332 (8th Cir. 1991) (spouse spying to gain information for divorce); *Kempf v. Kempf*, 868 F.2d 970 (8th Cir. 1989) (spying by husband on wife to confirm affair); *Pritchard v. Pritchard*, 732 F.2d 372 (4th Cir. 1984) (ex-spouse intercepted conversations with no indication that child's welfare was involved).

Also, *Platt v. Platt*, 951 F.2d 159 (8th Cir. 1989) is not in conflict with the Seventh Circuit's decision. In *Platt*, a wife spied on her estranged husband by taping her daughter's conversation with her spouse during the pendency of a divorce proceeding. The district court dismissed the husband's complaint at the pleading stage based on interspousal immunity. The Court of Appeals reversed finding no interspousal immunity under the Act. The extension telephone exemption was not raised by the wife as a defense. Moreover, under the facts recited, the exemption should not have been applied. Nothing objective indicated that the wife was doing anything more than spying; the child's welfare was not involved.

Likewise in *Thompson v. Dulaney*, 970 F.2d 744 (10th Cir. 1992), the Tenth Circuit reversed a decision of a district court, which held that the Act did not apply to a "domestic dispute situation," reiterating its holding in *Heggy v. Heggy*, 944 F.2d 1537 (10th Cir. 1991)[6] that there is no interspousal exception in the Act. 970 F.2d at 746. Significantly, the Tenth Circuit decision in *Thompson* left *Newcomb* entirely intact.

In addition, the court observed "[n]o language in the statute evidences a congressional intent to except tapping *in this factual setting*." 970 F.2d at 748 (emphasis supplied). The court added: "we hasten to note that not all wiretap interceptions involving spouses will be actionable." *Id.* In then discussing why such interceptions may not be actionable the court referenced the extension phone exemption, noting "[t]he scope of this section has not been developed." *Id*, nt. 5. The mother in *Thompson* raised several defenses,

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[6] The defendant in *Heggy*, the director of the Oklahoma Bureau of Narcotics and Dangerous Drugs, instructed one of his agents from the Bureau to install a tap on the phone in his barn.

including a parent's right to consent for her minor child, but the extension phone exemption was not raised.[7]

Examination of the actual application of the Act to specific factual situations reveals there is no conflict among the Circuits which requires this Court's intercession.

II.

THE SEVENTH CIRCUIT CORRECTLY APPLIED THE PLAIN LANGUAGE OF THE ACT AND ITS EXTENSION TELEPHONE EXEMPTION TO THE FACTS PRESENTED. CONTRARY TO THE PETITIONERS' ASSERTIONS, THE SEVENTH CIRCUIT DID NOT CREATE A NEW EXEMPTION.

Petitioners deflect attention from the language of the statute and its application to the facts by semantically framing the issue as whether the Seventh Circuit created a "domestic relations" exception to the Act. That Court's Opinion, however, illustrates a prudent examination of the statutory language.

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[7] As the Opinion observes, the court's attempt in *Thompson* to distinguish *Newcomb* is somewhat cryptic. If read literally, the distinction would have allowed the father in *Newcomb*, who instructed his son to set fire to his mother's home, to successfully bring an action under the Act. Thus, to the extent that *Thompson* applies the exemption based on who is on the phone rather than determining if the *use* of the extension phone was proper, the decision is not well reasoned and should not be followed. The facts in *Newcomb*, and the instant case, illustrate the most severe flaw in applying the exemption based on the identity of the conversants: dangerous or cruel and abusive treatment of a child would become unreportable, even when known to a parent.

A. The Opinion, and the decisions of other Circuits, reject an "interspousal exception" to the Act and focus on the facts of a particular case in applying the extension phone exemption.

The Opinion appropriately focused on the exemption's requirement that it applies only to "subscribers" and "users" in the "ordinary course of business."[8] As the Opinion noted, telephone subscribers include both commercial and non-commercial customers, such as family homes. Further, the concept of a "domestic relations exception" never entered the analysis, other than to note that such an exception had been previously rejected.

Petitioners claim, that wiretapping is not an "ordinary" function of a parent, skews the statutory analysis and proper application of the Act's language. What must be considered, and what the Opinion examined, is the actual function of a parent. The Seventh Circuit correctly concluded that the function included "the need for parents with whom a minor child is living to obtain information concerning that child's welfare." App., p. 10, *Scheib v. Grant*, 22 F.3d at 153.

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[8] The Opinion holds that the phrase "ordinary course of business" should not be restricted in its meaning to only profit making endeavors. The court noted that this Court refused to read a profit-seeking activity into a statute absent clear language to that effect. App., p. 13, nt. 4, 22 F.3d at 154-155, nt. 4. In addition, this phrase is often used outside a commercial context. *See Moses H. Cone Hospital v. Mercury Constr.*, 460 U.S. 1, 36, 74 L.Ed.2d 765, 793, 103 S.Ct. 927 (1983) (dissenting opinion of the Chief Justice wherein the opinion refers to issues "that district judges decide every day in the ordinary course of business"). *See also Wilharms v. Wilharms*, 93 Wis.2d 671, 673, 287 N.W.2d 779, 781 (1980) (parties to divorce proceeding enjoined from disposing of personal assets "except in the ordinary course of business"); *see also, Pereira v. United States*, 347 U.S. 1, 9, 98 L.Ed. 435, 445, 74 S.Ct. 358 (1953) (knowledge that mail system will be used "in ordinary course of business" sufficient to establish cause for mail fraud).

This case, *Anonymous*, and *Newcomb* involved one parent using the cloak of a telephone line to abuse or place a minor child in jeopardy. Each decision properly held that the parent's use of an extension phone to monitor and record a minor's conversation, even with another parent, was justifiable supervision under the circumstances.

The decisions in *Platt* and *Thompson* illustrate that guidance from this Court is not necessary. Indeed, these cases show that Petitioners' dire prediction of rampant intra-family eavesdropping based on a "meaningless limitation of an assertion of proper purpose" is hyperbole. Each court (like the Seventh Circuit's Opinion) rejected any notion of a "domestic relations" or "interspousal" exemption and allowed actions to proceed under the Act.[9]

In this case, the uncontroverted facts demonstrated an emotionally disturbed eleven year old boy and cruel words from the mother hidden from discovery only because they were spoken under the cover of a phone line. These facts provided the "objectively reasonable" belief that justified the father's intervention. Thus, contrary to the Petitioners' assertion, courts understand the limits and bounds of the Act and the extension phone exemption as applied to a family context.

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[9] On remand, the District Court in *Thompson* examined the directions of its appellate court, as well as its previous decisions in *Newcomb* and *Heggy* and stated in support of its holding that a parent may vicariously consent to recording: "In this case, or perhaps a more extreme example of a parent who was making abusive or obscene phone calls threatening or intimidating minor children, vicarious consent is necessary to enable the guardian to protect the children from further harassment in the future. Thus, as long as the [parent] has a good faith basis that is **objectively reasonable for believing that it is necessary** to consent to the taping of the phone conversations, vicarious consent will be permissible in order for the [parent] to fulfill her statutory mandate to act in the best interest of the child." *Thompson v. Dulaney*, 838 F.Supp. 1535, 1544 (D.Utah 1993) (emphasis added).

B. The descriptive labels Petitioners use to characterize phone calls miss the point of the exemption.

Petitioners engage in some interpretive gymnastics, claiming that other Circuits have prohibited monitoring of private phone calls, citing *Watkins v. L.M. Berry*, 704 F.2d 577 (11th Cir. 1983) and *United States v. Harpel*, 493 F.2d 346 (10th Cir. 1974).

Yet, these cases demonstrate that *why* the monitoring occurred is more important than the identity of the caller or the label placed on the call. The court in *Watkins* drew on the analysis of the Fifth Circuit in *Briggs v. American Air Filter Co.*, 630 F.2d 414 (5th Cir. 1980), stating:

> the business extension exception operates without regard to consent. So long as the *requisite business connection* is demonstrated, the business extension exemption represents the 'circumstances under which non-consensual interception' is not violative of section 2511(1)(b). 704 F.2d at 581, quoting *Briggs*, 630 F.2d at 419 (emphasis added).

The "requisite business connection"—an appropriate reason why the employer listened—was not present in *Watkins* because the business whose extension phones were being used **explicitly permitted** employees to use the phones for personal calls; there could be no reason to listen to personal calls if they were permitted. The court thus held the exemption did not apply. The court added, however, that interception is permissible "to the extent necessary to guard against unauthorized use of the telephone." *Id.*

When no justifiable reason to monitor existed, the Circuit Courts have uniformly refused to apply the exemption. Cf. *Campiti v. Walonis*, 611 F.2d 387, 390, 392 (1st Cir. 1979) (not in ordinary course of business for prison guard to set-up a prisoner; the court, however, did not condemn the prison's policy of monitoring inmate conversations when

there was "reason to expect illegal inmate activity"); cf. *Gerrard v. Blackman*, 401 F.Supp. 1189, 1193 (N.D.Ill. 1975) (not in ordinary course of hospital's business "to intercept communications between patients and their counsel, a practice which would not be justified even if customary"); cf. *United States v. Harpel*, 493 F.2d 346 (10th Cir. 1974) (court finding tape of law enforcement officers' conversation was not telephone used in the ordinary course of business).

Where an appropriate reason was given relating to the subscriber's business, the Circuits have applied the exemption in a business context, even to personal calls. In *Epps v. St. Mary's Hosp. of Athens, Inc.*, 802 F.2d 412 (11th Cir. 1986), the court examined why the employer listened and found a legitimate purpose in monitoring the plaintiff's personal calls "because the content of the conversation dealt with employee relations, which is of direct concern to St. Mary's." 802 F.2d at 416.[10]

Neither the Opinion nor the decisions of other Circuits have strayed from the strictures of the Act and its purpose. The exemption has been sustained only where the user objectively proved a proper reason for monitoring over an extension phone.

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[10] Even the dissenting opinion, which took issue with the result, applied as its test an examination of why the recording occurred at the time it was made. 802 F.2d at 417-418.

III.

THE EMERGING NOTION OF CHILDREN'S RIGHTS DOES NOT SUPERSEDE A PARENT'S RESPONSIBILITY FOR THE CARE AND PROTECTION OF A CHILD'S WELFARE. THE PARENT WITH ACTUAL CUSTODY IS ENTITLED, AND OBLIGATED, TO ACT TO PROTECT HIS CHILD.

A. This Court has acknowledged the balance between children's rights and the need to protect children from harm.

The age and maturity of the minor, and the right involved, are factors which must be examined in every case relating to a minor and his or her relationship to the parent. In *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 49 L.Ed.2d 788, 96 S.Ct. 2831 (1976), this Court noted:

> We emphasize that our holding that sec. 3(4) is invalid does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy. 428 U.S. at 75, 49 L.Ed.2d at 808, 96 S.Ct. at 2844.

See also Carey v. Population Services Int'l., 431 U.S. 678, 692-3, 52 L.Ed.2d 675, 689-90, 97 S.Ct. 2010 (1977) (quoting the above, nt. 16, and observing that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults", quoting *Prince v. Massachusetts*, 321 U.S. 158, 170, 88 L.Ed. 645, 64 S.Ct. 438 (1944)).

In dissenting on that portion of the opinion in *Planned Parenthood* dealing with parental consent, Justice Stevens summarized the special treatment children receive exactly because they are children:

> The State's interest in the welfare of its young citizens justifies a variety of protective measures. Because he may not foresee the consequences of his decision, a minor may not make an enforceable bar-

> gain. He may not lawfully work or travel where he pleases, or even attend exhibitions of constitutionally protected adult motion pictures. Persons below a certain age may not marry without parental consent. 428 U.S. at 102, 49 L.Ed.2d at 823-824, 96 S.Ct. at 2856.

The Illinois Supreme Court likewise recognized that age and maturity are the essential factors effecting the breadth of a child's rights. In *In Re E.G.*, 133 Ill.2d 98, 549 N.E.2d 322 (1989), the court observed that "[a] minor may have a long and fruitful life ahead that an immature, foolish decision could jeopardize." 133 Ill.2d at 110, 549 N.E.2d at 327. The court also recognized that certain child's rights are "not absolute" and that trial courts faced with competing concerns of rights versus protection must "determine whether a minor is mature enough" to consider and appreciate the consequences of their actions. 133 Ill.2d at 110-111, 549 N.E.2d at 326-328. Because the child in *In Re E.G.* was seventeen, and because the trial court went to great lengths in evaluating her maturity, the Illinois Supreme Court found that she was entitled to refuse medical treatment.

The state places primary responsibility of protecting minors squarely on the shoulders of parents. And, the parents' right to raise their children is constitutionally protected. This Court confirmed this special position in *Hodgson v. Minnesota*, 497 U.S. 417, 111 L.Ed.2d 344, 110 S.Ct. 2926 (1990), quoting from *Stanley v. Illinois*, 405 U.S. 645, 31 L.Ed.2d 551, 92 S.Ct. 1208 (1972), this Court noted:

> It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. [citation omitted]. The integrity of the family unit has found protection in the Due Process

> Clause of the Fourteenth Amendment, [citations omitted], the Equal Protection Clause of the Fourteenth Amendment, [citations omitted] and the Ninth Amendment [citations omitted]. 497 U.S. at 447, 111 L.Ed.2d at 369, 110 S.Ct. at 2943.

The test Petitioners postulate, what a teenager may think about a parent listening to his telephone conversations, is irrelevant and, we suggest, dangerous. The child in the instant case was only eleven years old and obviously in distress. A parent observing harm to his child cannot abdicate responsibility in deference to what a child may think.

And, that is what a good parent will always do. We submit that the extension phone exemption is there to allow just exactly the parental act which occurred here. See Opinion, District Court, App. p. 28: Hearings on the Anti-Crime Program Before Subcomm. No. 5 of the House Judiciary Comm., 90th Congress, 1st Sess. 989 (1967).

B. The parent with lawful, actual custody of a minor child may, and must, act to protect the child in accord with the child's best interests.

On the weight of reason and precedent, the Opinion rejected the suggestion, made again here by Petitioners, that "legal" custody precludes a parent with actual, lawful custody from taking action in the child's best interest.

The agreement into which Ms. Scheib and the father entered contained a provision which correctly states Illinois law:

> Each party shall have the day to day decision making authority regarding BENJAMIN when BENJAMIN is in that party's respective physical possession. (R.40, Ex. 3, p.7).

The right of visitation is defined in Illinois precedent as ". . . a form of custody." *People v. Harrison*, 82 Ill.App.3d

530, 532, 402 N.E.2d 822, 824 (4th Dist. 1980). A determination of custody under Illinois statute is a determination "including visitation rights." 750 ILCS 35/3.02 (Smith-Hurd 1993). The term "person having custody" in the Illinois Juvenile Court Act includes "parents who had rights of visitation subject to the general custody in the other parent." *In re Rider*, 113 Ill.App.3d 1000, 1003, 447 N.E.2d 1384, 1386 (4th Dist. 1983).

Every parent of a child, when with the child, has what is both in law and in fact custody of that child, with the rights and duties of that status. *In re Myer*, 100 Ill.App.3d 27, 31, 426 N.E.2d 333, 336 (4th Dist. 1981); *see also In re Markey*, 223 Ill.App.3d 1055, 586 N.E.2d 350 (1st Dist. 1991) (the child's best interest required that either parent be allowed to grant access to the child's mental health records).

The statute and precedent comport with reality: when a child is lawfully with a parent, then that parent can do whatever any parent can do when that child is with a parent. This unquestionably extends to decisions involving the health and welfare of the child.[11] Thus, no logical or legal basis supports Petitioners' suggestion that the father's actions were inappropriate simply because (they claim) he was not his son's "legal custodian."

CONCLUSION

This case presents neither a conflict between the Circuits nor unsettled questions of statutory application. Courts of Appeal and District Courts have correctly read and applied

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[11] *See Taylor v. R.D. Morgan & Assoc.*, 205 Ill.App.3d 682, 691, 563 N.E.2d 1186, 1192 (5th Dist. 1990) (in emergencies, a "non-custodial" parent may consent to medical treatment when that parent has actual custody).

the Act to the specific factual situations before them. Petitioners ask this Court to intercede to review their particular circumstances, which have been adjudicated correctly and consistent with precedent.

Respondents Joan C. Grant and Burton F. Grant respectfully submit that the Petition should be denied.

Respectfully submitted,

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